Supreme Court, U.S.
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No. 05-384 SEP 22 2005

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In The
Supreme Court of the United States

PAUL S. HAMMEL,

Petitioner,

v.

EAU GALLE CHEESE FACTORY,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

In this employment case brought under the Americans with Disability Act ("ADA"), the United States Court of Appeals for the Seventh Circuit held that the district court did not commit clear error when it found that, due to his bad attitude, Petitioner was not a "qualified individual" under the ADA. The Seventh Circuit also concurred with the district court that Petitioner presented no reasonable accommodations, and therefore declined to consider Respondent's lack of participation in any "interactive process" as moot. The questions presented are:

1. Are non-disability related factors such as an employee's perceived attitude relevant in determining whether that individual is a "qualified individual" under the ADA?

2. Should an employer's duty to participate in the "interactive process" only be triggered after an employee first proposes a specific reasonable accommodation to the employer?

3. Can an employer escape *per se* liability under the ADA if it refuses to participate in the "interactive process"?

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Petitioner respectfully requests that this Court grant his writ of certiorari and review the judgment of the United States Court of Appeals for the Seventh Circuit, entered on May 11, 2005.

OPINIONS AND ORDERS BELOW

The Equal Employment Opportunity Commission ("EEOC") determination that "there is reasonable cause to believe that there is a violation of the Americans with Disabilities Act of 1990" in this case is reproduced in the Appendix to this Petition ("App.") at App. 116. The EEOC right-to-sue letter is reproduced at App. 118. The Initial Determination of the State of Wisconsin Department of Workforce Development, Equal Rights Division ("ERD") is reproduced at App. 120, with the subsequent determination that "there is probable cause to believe that the Respondent employer has engaged in discriminatory practices" reproduced at App. 128. ERD proceedings were dismissed in preference of litigation in another forum by order reproduced at App. 132.

The United States District Court for the Western District of Wisconsin's order granting partial summary judgment is reproduced at App. 55. The District Court's trial Opinion and Order is reproduced at App. 34. Plaintiff's Motion to Alter Judgment as a Matter of Law, or in the Alternative for a New Trial, was denied by the District Court in an order reproduced at App. 85.

The judgment of the United States Court of Appeals for the Seventh Circuit is published at 407 F.3d 852 and is

reproduced at App. 1. The Court of Appeals' denial of Petitioner's Petition for a Rehearing or Rehearing En Banc was entered on June 24, 2005, and is reproduced at App. 95.

JURISDICTION

The judgment of the United States Court of Appeals for the Seventh Circuit was entered on May 11, 2005. On June 24, 2005, the panel denied Petitioner's request for a rehearing and rehearing en banc. This Court has jurisdiction pursuant to 28 U.S.C. § 1254.

STATUTES AND REGULATIONS INVOLVED

The ADA mandates:

> No covered entity shall discriminate against a qualified individual with a disability because of the disability of such individual in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment.

42 U.S.C. § 12112(a) (2005). A "qualified individual" is:

> [A]n individual with a disability who satisfies the requisite skill, experience, education and other job-related requirements of the employment position such individual holds or desires, and, who, with or without reasonable accommodation, can perform the essential functions of the position.

29 C.F.R. § 1630.2(m) (2005); *see also* 42 U.S.C. § 12111(8).

A "reasonable accommodation" is defined as:

> (i) Modifications or adjustments to a job application process that enable a qualified applicant with a disability to be considered for the position such qualified applicant desires; or
>
> (ii) Modifications or adjustments to the work environment, or to the manner or circumstances under which the position held or desired is customarily performed, that enable a qualified individual with a disability to perform the essential functions of that position; or
>
> (iii) Modifications or adjustments that enable a covered entity's employee with a disability to enjoy equal benefits and privileges of employment as are enjoyed by its other similarly situated employees without disabilities.

29 C.F.R. § 1630.02(o).

Further, a reasonable accommodation may include, but is not limited to:

> (i) Making existing facilities used by employees readily accessible to and usable by individuals with disabilities; and
>
> (ii) Job restructuring; part-time or modified work schedules; reassignment to a vacant position; acquisition or modification of equipment or devices; appropriate adjustment or modifications of examinations, training materials or policies; the provision of qualified readers or interpreters; and other similar accommodations for individuals with disabilities.

Id.; *see also* 42 U.S.C. § 12111(9). The Regulations set forth the process by which reasonable accommodations should be determined:

> To determine the appropriate reasonable accommodation it may be necessary for the covered entity to initiate an informal, interactive process with the qualified individual with a disability in need of the accommodation. This process should identify the precise limitations resulting from the disability and potential reasonable accommodations that could overcome those limitations.

29 C.F.R. § 1630.02(o)(3).

STATEMENT OF THE CASE

This case concerns an employer who admits firing an employee because of his disability. The employer was held not liable for these actions, however, because the district court and the Seventh Circuit determined that it was appropriate to consider the disabled worker's *attitude* in determining whether the worker was a "qualified individual" under the ADA (even though it was determined on undisputed facts that the employee was *not* fired because of his attitude or because of work performance issues). If this precedent is upheld, employers will be free to discriminate against disabled workers and simply later claim that the workers' poor attitudes precluded them from being considered "qualified individuals" under the ADA. The Seventh Circuit's reasoning undermines the spirit, intent, and plain language of the ADA. Given the similar frameworks and analogous burdens of proof shared by the ADA, the Age Discrimination in Employment Act ("ADEA"), and Title VII, the Seventh Circuit's reasoning also endangers the integrity of those statutes and may open the door for employers to discriminate against members of other protected classes, claiming those employees also do not constitute "qualified individuals" for attitudinal reasons.

Petitioner Paul S. Hammel is legally blind. He has no vision in his right eye and the field of vision in his left eye is restricted to a corridor of less than twenty degrees. (App. 2.)

In early January 2000, Petitioner applied for a job with Respondent Eau Galle Cheese Factory. He met with Respondent's supervisors and advised them of his limited vision. None of Respondent's supervisors or managers had experience working with blind people. When he was hired, Petitioner asked Respondent's supervisors to tell him if they ever had any concerns regarding his blindness and his ability to perform his job. (App. 135-36.)

Shortly after the interview process, Respondent offered Petitioner a job as a general laborer in the cheese factory. When he first began working at the factory, he performed tasks in the "make room" and the "brine room."[1] After a couple of days, Respondent's supervisors moved Petitioner to the "make room" full-time instead of rotating him between the two rooms. (App. 57-58.) Respondent never advised Petitioner of the basis for this change, and Petitioner assumed it was part of the normal course of employment there. (App. 59.)

During Petitioner's first three weeks of employment at Respondent's factory, Respondent never told Petitioner that it perceived his blindness was causing performance problems. Nor did the company ever approach Petitioner to inquire or discuss whether any accommodation would

[1] Respondent's cheese-making process involves two rooms referred to as the "make room" and the "brine room." In the make room, employees place cheese curds into metal forms, press excess moisture from the forms, and trim the cheese. The cheese is then taken to the brine room, where the cheese is soaked in brine, dried, wrapped, and stamped. (App. 38-39.)

assist him in performing his job better or more safely. Respondent also never informed Petitioner that he was at risk of losing his job if his performance did not improve. (App. 136.)

Notwithstanding Respondent's silence regarding any perceived disability-related work performance issues, Respondent terminated Petitioner on January 27, 2000. At that time, the factory supervisor told him that the company believed Petitioner's vision impairment interfered with his work and posed a safety risk to Petitioner and other employees. A memorandum prepared contemporaneously with Petitioner's termination stated that he was terminated for "non-disciplinary reasons." (App. 43.) Nothing in Respondent's files suggests that Petitioner was fired for any reason other than his disability. When asked post-termination whether Respondent should have approached Petitioner to discuss disability-related concerns affecting his performance, Respondent's owner testified that accommodations were never discussed with Petitioner because he could not "make [Petitioner] see" and "that was the problem." (App. 59.)

Petitioner filed his charge of employment discrimination with the Wisconsin Department of Workforce Development Equal Rights Division, ("ERD") in February 2000, and cross-filed with the EEOC. Ultimately, both agencies found that probable and reasonable cause existed to believe that Respondent discriminated against Petitioner on the basis of his disability. (App. 116-17, 126-27.) The EEOC took no further action and gave Petitioner a right-to-sue letter.